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No. 94-2107

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

COMMONWEALTH OF VIRGINIA, *et al.*,
Cross-Petitioners,

v.

UNITED STATES OF AMERICA,
Cross-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE CROSS-PETITIONERS

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1. The purpose of this cross-petition is to maintain the principle that States may offer single-sex educational opportunities on the basis of student demand and institutional interests where legitimate pedagogical justifications exist for doing so, without thereby violating the Constitution. Cross-respondent errs in suggesting (Br. in Opp. 3) that cross-petitioners seek to "maintain an all-male admissions policy at VMI and take no remedial steps whatsoever." To the contrary, as previously explained (Cross-Pet. 3), cross-petitioners support the remedy approved by the court of appeals and are taking all necessary steps to ensure the success of the VWIL program in accordance with the rulings below.[1]

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[1]If anything, it is cross-respondent, not cross-petitioners, who seeks to destroy VWIL and the unique benefits it offers to college-age women. Under cross-respondent's

[Footnote continued on next page]

2. The unmistakable import of the court of appeals' opinions in this case is to preclude the States from offering the option of single-sex education to members of one gender unless a "parallel" and "substantively comparable" single-sex educational opportunity is offered to members of the other gender. Cross-respondent asserts (Br. in Opp. 4-5) that the court of appeals' holding in this regard follows directly from *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). Nothing in *Hogan* supports this assertion.

To the contrary, the *Hogan* Court's careful analysis of the proffered state objective and the relationship between that objective and the challenged classification (*see* 458 U.S. at 727-31) would have been wholly superfluous if, as cross-respondent suggests and the court below held, the absence of any state-provided single-sex educational opportunity for the excluded gender was *itself* sufficient to render the challenged admissions policy unconstitutional. Under the court of appeals' view of the law, the Court's opinion in *Hogan* could have ended with its first footnote, which observed that "Mississippi maintains no other single-sex public university or college." 458 U.S. at 720 n.1. That the *Hogan* Court instead evaluated the legitimacy of the challenged single-sex admissions policy *without regard to the absence of an analogous program for members of the excluded gender* demonstrates the fallacy of cross-respondent's argument (Br. in Opp. 5) that the liability

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[Footnote continued from previous page]

proposed interpretation of the Equal Protection Clause, VWIL's continued existence would be problematic at best, because the Commonwealth does not offer an identical educational experience to male students. *See* 94-1941 Pet. 16-29.

decision in this case reflects "a straightforward application" of *Hogan*.

3. Cross-respondent also errs in denying (Br. in Opp. 5-6) that the court of appeals' opinions demonstrate VMI's compliance with the two-pronged *Hogan* test. Indeed, as previously demonstrated (Cross-Pet. 4-6), the court's second opinion (*VMI II*) is quite clear on this point. Cross-respondent appears to contend (Br. in Opp. 6-7) that this Court is precluded from considering the findings in *VMI II* insofar as they shed light on the liability issue, but cross-respondent offers no authority for that novel assertion. In any event, the court of appeals' original opinion on liability (*VMI I*) also demonstrates that VMI's single-sex admissions policy satisfies the two-pronged *Hogan* test.

In *VMI I*, the court concluded that "VMI's male-only policy is justified by its institutional mission." Pet. App. 151a. The court based that conclusion on findings that "single-sex education is pedagogically justifiable, and VMI's system . . even more so," *id.*, and that the exclusion of women from VMI is essential to the Commonwealth's ability to offer the unique VMI opportunity "because the change caused by th[e] admission [of women] would destroy the opportunity." *Id.* at 148a. These findings demonstrate that VMI's single-sex admissions policy passes muster under *Hogan*, because VMI "serves 'important governmental objectives'" and the "'means employed' are 'substantially related to the achievement of those objectives.'" 458 U.S. at 724.

Rather than conclude its analysis at this point, however, the court of appeals went on to impose a separate and additional requirement, namely, that the Commonwealth independently justify its failure to provide a parallel single-sex educational opportunity for women. *See* Pet. App. 151a-56a; *accord id.* at 7a, 17a (*VMI II*). It was only by creating this additional requirement that the court of appeals was able to conclude that VMI failed to pass muster. Thus,

cross-respondent's reliance (Br. in Opp. 5-6 & nn.3-4) on the court of appeals' conclusion in this regard is entirely misplaced, because it begs the key question whether the court erred in engrafting this additional requirement onto *Hogan* in the first place.[2]

4. Finally, cross-respondent persists in mischaracterizing the nature of the state interest at issue in this case. Rather than pursuing a goal of "providing single-sex education exclusively to males" (Br. in Opp. 7), as cross-respondent would have it, the Commonwealth has instead consistently sought to foster educational diversity by providing a wide array of educational opportunities (including the unique benefits of single-sex education) within the limitations imposed by finite resources, student demand, and the autonomous responses of individual educational institutions to those factors. That objective is plainly a legitimate one (*see* Pet. App. 21a), and cross-respondent's suggestions to the contrary are without merit.

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[2]Cross-respondent denies (Br. in Opp. 7-8) that the court of appeals created a third requirement in addition to the two-pronged *Hogan* test. As already explained, however (*see supra* at 2-4; Cross-Pet. 6), nothing in *Hogan* supports the proposition that any time a State offers pedagogically justified single-sex educational opportunities to members of one gender it must also offer a parallel program to members of the other gender, regardless of the level of demand for that program, the pedagogical value of the program, and the relative importance of competing uses for the State's limited educational resources.

CONCLUSION

For the reasons set forth in the brief in opposition filed in No. 94-1941, the petition for a writ of certiorari in No. 94-1941 should be denied. If that petition is granted, however, the conditional cross-petition in No. 94-2107 should also be granted.

Respectfully submitted.

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